

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Roderick English,)	C/A No.: 1:13-2677-JFA-SVH
)	
Plaintiff,)	
)	
vs.)	
)	
Doctor Beverly A. Wood; Donikias)	REPORT AND RECOMMENDATION
Gray; Counselors Maddox; William R.)	
Byars, Jr.; Doctor Nocho Perez; Ashley)	
Sharmane Washington; and Doctor)	
Ferluato,)	
)	
Defendants.)	
)	

Plaintiff Roderick English, proceeding pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983. Plaintiff alleges a denial of medical treatment by employees of the South Carolina Department of Corrections (collectively “Defendants”). [Entry #1 at 3]. Pursuant to the provisions of 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(d) (D.S.C.), the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the district judge. For the reasons that follow, the undersigned recommends that the district judge dismiss the complaint in this case without prejudice and without issuance and service of process.

I. Factual and Procedural Background

Plaintiff alleges that he has not received medication for anxiety since his release from prison in 2003, when he could not afford the medication. [Entry #1 at 7]. Plaintiff is now incarcerated at McCormick Correctional Institution and alleges that a prison doctor negligently failed to prescribe anxiety medication for him and has failed to

“respond appropriately” to his serious medical need. *Id.* Plaintiff indicates that he has filed a grievance concerning the matter with defendant William R. Byars Jr. *Id.* at 5. While the complaint fails to specifically discuss each defendant named in the case, letters submitted by Plaintiff assert that a prison counselor, Ashley Sharmane Maddox Washington, and prison physician, Dr. Ferluato Nocho Perez, are primarily responsible for the alleged denial of anxiety medication.¹ [Entry ## 12, 13, 15]. Plaintiff indicates that Perez made the determination that Plaintiff does not need anxiety medication on October 10, 2013, after a thirty-minute consultation. [Entry #12 at 2]. Plaintiff further alleges that he unsuccessfully requested medical information from Washington on September 30, 2013. *Id.* Plaintiff seeks injunctive relief. [Entry #1 at 8].

II. Discussion

A. Standard of Review

Plaintiff filed his complaint pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action fails to state a claim on which relief may be granted or is frivolous or malicious. 28 U.S.C. § 1915(e)(2)(B)(i), (ii). A finding of frivolity can be made where the complaint lacks an arguable basis either in law or in fact. *Denton v. Hernandez*, 504 U.S.

¹ Plaintiff’s letters and service documents indicate that the defendant identified as Counselors Maddox in the complaint’s caption may be the same defendant identified elsewhere in the pleadings as Ashley Sharmane Washington. Further, the defendants identified as Doctor Nocho Perez and Doctor Ferluato appear to be the same individual.

25, 31 (1992). A claim based on a meritless legal theory may be dismissed *sua sponte* under 28 U.S.C. § 1915(e)(2)(B). See *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

Pro se complaints are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). A federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). When a federal court is evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. *Fine v. City of N.Y.*, 529 F.2d 70, 74 (2d Cir. 1975). The mandated liberal construction afforded to pro se pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. Nevertheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 390–91 (4th Cir. 1990).

B. Analysis

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). In addition, a plaintiff must affirmatively show that a defendant acted personally in the deprivation of his constitutional rights. *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977).

1. Negligence is not cognizable under § 1983

To the extent Plaintiff alleges a claim of negligence against Defendants for failing to appropriately diagnose and treat his anxiety, the law is well settled that a claim of negligence is not actionable under 42 U.S.C. § 1983. *See Daniels v. Williams*, 474 U.S. 327, 335–36 n. 3 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347–48 (1986); *Pink v. Lester*, 52 F.3d 73 (4th Cir. 1995) (nothing that *Daniels* bars an action under § 1983 for negligent conduct). Therefore, any medical malpractice or negligence claim asserted against Defendants by Plaintiff is subject to summary dismissal.

2. Lack of exhaustion

Liberalized construed, Plaintiff also alleges a claim of deliberate indifference to medical needs against Defendants. The Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (“PLRA”), requires that a prisoner exhaust his administrative remedies before filing a § 1983 action concerning his confinement. Specifically, 42 U.S.C.A. § 1997(e) states: “No action shall be brought with respect to prison conditions under Section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” The purpose of the exhaustion requirement is twofold. First, it gives an administrative agency “an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.” *Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (internal quotations and citation omitted). Second, “[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court.” *Id.*

A plaintiff's failure to exhaust administrative remedies is considered an affirmative defense, and not a jurisdictional infirmity. *Jones v. Bock*, 549 U.S. 199, 216 (2007). However, if the lack of exhaustion is apparent from the face of the prisoner's complaint, *sua sponte* dismissal prior to service of the complaint is appropriate. See *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 683 (4th Cir. 2005); see also *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008); *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 655–56 (4th Cir. 2006). Here, Plaintiff alleges that he filed his prison grievance concerning the issues raised in this case on August 29, 2013, and has not yet received a final agency answer.² [Entry #1 at 3]. As Plaintiff signed his complaint on September 6, 2013, *id.* at 8, it is clear from the face of the pleading that this action should be summarily dismissed without prejudice for failure to exhaust administrative remedies.

III. Conclusion and Recommendation

For the foregoing reasons, it is recommended that this case be dismissed without prejudice and without issuance and service of process.

IT IS SO RECOMMENDED.



October 30, 2013
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

**The parties are directed to note the important information in the attached
“Notice of Right to File Objections to Report and Recommendation.”**

² A Step One grievance attached to the complaint further reflects that the issues raised in this case are currently being address in another prison grievance filed by Plaintiff. [Entry #1-4 at 13].

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).